UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD Washington, D.C.

FORTUNA ENTERPRISES, L.P., a Delaware limited partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers

and

UNITE HERE, Local 11

Case Nos.: 31-CA-27837

31-CA-27954 31-CA-28011

CHARGING PARTY'S RESPONSE TO RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Eric B. Myers
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: 415-597-7200

415-597-7201

Facsimile:

Attorneys for Charging Party UNITE HERE, Local 11

Charging Party UNITE HERE Local 11 hereby answers the Employer's Brief in Support of its Exceptions to the Supplemental Decision of the Administrative Law Judge.

INTRODUCTION

On April 30, 2009, the National Labor Relations Board ("NLRB") affirmed the findings of the Administrative Law Judge ("ALJ") on nearly all grounds, including the finding that the Respondent, through its 2(11)/2(13) agent Pablo Burciaga, violated Section 8(a)(1) of the National Labor Relations Act by threatening employee Antonio Campos with physical violence for participating in protected concerted activity. *Fortuna Enterprises, L.P., a Delaware Limited Partnership d/b/a the Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB No. 17 (2009). However, the NLRB ruled that the Administrative Law Judge's decision did not provide an adequate basis for reviewing the finding that Respondent, through Burciaga, violated Section 8(a)(1) of the Act by physically pushing employees Herman Chan, Antonio Campos and Juan Banales, and by pushing his finger into the chest of Mike Kaib.

On July 22, 2009, the Administrative Law Judge issued a Supplemental Decision in which he detailed the basis for his decision to credit the testimony of Campos and Banales and to reject the credibility of Burciaga's testimony. Respondent has excepted to the finding of the Administrative Law. For the following reasons, the NLRB should affirm the findings of the Administrative Law Judge on issues of credibility and adopt the recommended order.

LEGAL ANALYSIS

I. THE ADMINISTRATIVE LAW JUDGE'S CREDIBILITY DETERMINATIONS DESERVE SUBSTANTIAL DEFERENCE.

It is the policy of the NLRB not to disturb the credibility findings of an administrative law judge if they are supported by substantial evidence. "Weight is given to the administrative law judge's credibility determinations because she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records." *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)). The Board has ruled that

All aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely.

In addition to these subjective evaluations of witness demeanor, credibility resolutions are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.

Shen Lincoln-Mercury, 321 NLRB at 589 (quoting Penasquitos Village v. NLRB, 565 F.2d 1074, 1078-79 (9th Cir. 1977)).

Here, the ALJ based his credibility determination in important part upon the relative demeanor of the witnesses. He explained the basis for this factual finding at length. (Supplemental Decision, p. 2.) Those findings included the facts that Campos and Banales presented "forthright attitudes" while Burciaga "was often non responsive to questions." (Supplemental Decision, p. 2.) Furthermore, the Administrative Law Judge

found that Burciaga's testimony was contradicted by the Respondent's own internal investigation, an investigation that corroborated the substance of Campos and Banales' testimony while refuting Burciaga's denials. (*Id.*) Based on clear Board law, the Administrative Law Judge's credibility determinations should be upheld. *Tower Industries d/b/a Allied Mechanical*, 349 NLRB 1327 (2007); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004), *enf'd*, 157 Fed. App. 330 (D.C. Cir. 2005); *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951).

II. THE ADMINISTRATIVE LAW JUDGE'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Administrative Law Judge's decision was supported by substantial evidence. On or around April 6, 2006, employees organized a delegation to meet with management over complaints that the kitchen and restaurant lacked adequate equipment. They met with Assistant Director of Food and Beverage Manny Collera and Restaurant Manager Efrain Vazquez in the kitchen at around 6 p.m. during a regular pre-shift meeting with wait staff. Kaib spoke on behalf of the other employees. He requested permission to place piggy banks around the kitchen and restaurant to solicit funds to purchase equipment. (R. 65.) Collera and Vazquez replied they were not authorized to permit piggy banks. They did not ask any of the employees to leave the meeting, which was conducted peacefully. (R. 83.)

Campos, Chan and Banales listened in on the meeting, which took place in an area of the kitchen where they were allowed to go. (R. 85.) Campos and Banales shared the

view that the kitchen lacked equipment: They had previously complained to Executive Chef Rolf Jung ("Jung") about the matter, and were not satisfied with his response.

(R. 93; 213.)

As the meeting proceeded, Burciaga approached Campos, Chan and Banales. He grabbed Chan and Banales by the shoulders and pushed them towards their work areas.

(R. 27.) He then grabbed Campos and shoved him towards his work area. He used force that was "hard enough to take me by pushing me hard." (R. 67.)

Burciaga denied making contact with the employees, insisting that he came no closer than two feet away. (R. 1092.) But during an interview with Assistant Human Resources Director Shelly Romo ("Romo") following the incident, Vasquez stated he saw Burciaga "grab" Campos. (C.P. Exh. 2.)¹

As Burciaga led the kitchen workers away, Kaib questioned what he was doing. Burciaga turned toward Kaib. He angrily told Kaib to shut up and to mind his own business. At the same time, he forcefully jabbed his index finger into Kaib's chest. (R. 68-69; 217.)

Burciaga admitted he told Kaib to shut up, but denied touching him. He incredibly maintained he was not even irritated at Kaib, despite that he does not typically tell employees to shut up. (R. 1096; 1095.) He also insisted he did not raise a hand towards

Vasquez was an admitted 2(11)/2(13) agent of the Respondent. (Answer, ¶ 5.) His statement to Romo was a non-hearsay admission of a party opponent. Given that Vasquez's statement to Romo was admissible, non-hearsay evidence, it was incumbent upon the Respondent, not the General Counsel, to call him to refute his own statements.

Kaib, but that he kept his arms at his hips. (R. 1097.) Vazquez again contradicted Burciaga. He told Romo that he witnessed Burciaga raise his hand toward Kaib. (C.P. Exh. 2.)

After interviewing witnesses, Romo drafted a disciplinary letter indicating Burciaga had engaged in misconduct. (G.C. Exh. 14.) The letter stated: "Should you violate this or any other policy of the hotel/company, further disciplinary action may occur, up to and including termination of employment." (*Id.*) Respondent did not issue the letter to Burciaga. Rather, it issued a sanitized letter that deleted any suggestion that Burciaga behaved inappropriately. (G.C. Exh. 13.) Trobaugh testified that she vetoed Romo's decision after looking over "some" of the investigation because she considered it too strong. (R. 2126.) Respondent did not punish Burciaga.

ANALYSIS

An employer violates Section 8(a)(1) if it assaults or otherwise physically abuses its employees in response to their protected activities. *Kenrich Petrochemicals*, 294 NLRB 519, 535 (1989) (pushing coercive); *Graves Trucking*, 246 NLRB 344 (1979), *enf'd, in pertinent part*, 692 F.2d 470 (7th Cir. 1982) (choking coercive); *Studio S.J.T. Limited*, 277 NLRB 1189, 1994, 1200 (1985) (raking nails across employee's back and snapping bra coercive); *Federated Stores*, 241 NLRB 240, 252 (1979) (seizing employee by arm and shaking fist coercive); *Greyhound Taxi Co.*, 234 NLRB 865, 875 (1978); *Hot Bagels and Donuts*, 227 NLRB 1597, 1608 (1977); *Schultz, Snyder & Steele Lumber*, 198 NLRB 431, 434-35 (1972).

Burciaga engaged in several physical assaults. First, he grabbed Campos, Chan and Banales by the shoulders and pushed them away from the meeting. He did so because they were listening in on a meeting in which Kaib and others were complaining about working conditions.² Next, Burciaga jabbed his finger repeatedly into Kaib's chest. He did so because he wanted Kaib to "shut up" instead of asking why kitchen workers could not listen to a meeting concerning kitchen working conditions.

The Administrative Law Judge was correct to reject Burciaga's transparently untruthful denials. Not only do they contradict the credible accounts of the employee witnesses, they contradict Vazquez's statement that Burciaga grabbed Campos and raised his hand towards Kaib. Romo was clearly unconvinced after interviewing witnesses: she was prepared to issue Burciaga a disciplinary letter. Burciaga would have been disciplined except that Trobaugh came to his rescue.

Respondent argues that Burciaga's conduct was a legitimate effort to persuade employees to return to work. Respondent is wrong. Burciaga did not simply warn employees to return to work in accordance with a rule prohibiting discussions in the kitchen (there was no such rule). He physically shoved and poked employees in violation

² Respondent argues that Campos, Chan and Banales were not engaged in protected conduct because employees from other departments came to the meeting as well. Respondent raises a red herring. If Respondent had disciplined employees from other departments based upon a uniformly enforced rule prohibiting their conduct, it might argue that *those* disciplines were not unlawful as to *those* employees. But Respondent identified no rule that prohibited Campos, Chan and Banales from listening to a discussion being held in the kitchen near their work area. Kaib—a waiter—was obviously permitted to attend a pre-shift meeting for waitstaff. The subject matter of the meeting—the lack of kitchen and restaurant equipment—clearly concerned terms and conditions of employment.

of Respondent's own rules. (See Res. Exh. 28, p. 64, Rules 3-7.) The Administrative Law Judge was correct in finding that Burciaga's conduct violated Section 8(a)(1).

CONCUSION

For the foregoing reasons, the Administrative Law Judge's finding that Burciaga coercively pushed employees Campos, Chan and Banales, and pushed his finger into the chest of Mike Kaib, should be affirmed. The recommended order should be adopted.

Dated: September 23, 2009 Respectfully submitted,

s/Eric B. Myers

Eric B. Myers
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: 415-597-7200

Facsimile: 415-597-7201

Attorneys for Charging Party UNITE HERE Local 11

PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 1400, San Francisco, CA 94105.

On September 23, 2009 I served the document described as **CHARGING PARTY'S RESPONSE TO RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE**

ADMINISTRATIVE LAW JUDGE by electronic mail at the e-mail addresses indicated below and by placing a true copy thereof enclosed in a sealed envelope and depositing same with United Parcel Service for overnight delivery addressed as follows:

Brian D. Gee, Supervisory Attorney Counsel for the General Counsel National Labor Relations Board Region 31 11150 West Olympic Blvd., Suite 700 Los Angeles, CA 90064

Ford & Harrison, LLP 350 South Grand Ave., Suite 2300 Los Angeles, Ca 90071

Stephen R. Lueke, Esq.

slueke@fordharrison.com skroll@fordharrison.com

Brian.Gee@nlrb.gov

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Executed on September 23, 2009 at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

s/Renee Saunders	
Renee Saunders	